

The Australian Family Association (AFA)



Submission to the
Inquiry into the Marriage Equality Amendment Bill 2010

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Senate Legal and Constitutional Committee
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Australia

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To the Committee:

Submission to the Inquiry into the *Marriage Equality Amendment Bill 2010*

From the Australian Family Association

We thank the Committee for this opportunity to contribute to an important debate. It is the strong recommendation of the AFA that the proposed amendment to the *Marriage Act 1961* be rejected. We provide the following reasons.

In summary:

- Marriage is protected as a compound right in international law. Article 23 of the ICCPR states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State ... The right of men and women of marriageable age *to marry and to found a family* shall be recognised.” (emphasis added)
- The male-female sexual union is naturally oriented to the creation of children and the founding of this “natural and fundamental group unit of society”: the biological family.
- The state has an interest in its future citizens growing up in optimal circumstances. The state also has a responsibility to protect the child’s rights and interests.
- The state has an obligation to protect the child’s basic right to know and be cared for by his or her biological parents. The legal institution of marriage is a key mechanism by which the state protects this right, by encouraging men and women to make a legally binding, publicly witnessed declaration of lifelong, exclusive fidelity to one another.
- Marriage is the legal “binding agent” which binds husband and wife in a lifelong, permanent union, to mirror the immutable bonds of biological kinship with (and among) their children and extended family relatives.
- Marriage highlights the importance of permanence in the family-oriented heterosexual union.
- The state’s interest in marriage has nothing to do with appeasing a couple’s desire to have their “love” recognised or sanctioned by the state.
- The state’s involvement in marriage has do to with recognising the significant public interest in fostering lifelong, exclusive fidelity between a man and a woman intending to engage in a relationship whose very nature is oriented towards the creation of children and of a new biological family unit.

- Through marriage, the state encourages men and women to voluntarily commit to lifelong exclusive fidelity, by becoming *legally* bound through marriage.
- The legal bond is important, because it fortifies any private commitment – religious or otherwise – that the couple may have made to one another, with a view to engendering stability and longevity in anticipation of the rights and interests of the children which heterosexual unions are naturally oriented to producing.

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Marriage and the law: it's not the *word* that matters, it's the type of *relationship*

Since 1866 under the common law of the UK and Australia, and since 2004 under the Commonwealth *Marriage Act*, marriage has been explicitly defined in law as “the union of a man and a woman to the exclusion of all others for life”.

This definition is not arbitrary. The male-female sexual union is singled out because it is our species' only reproductive kind of relationship. Marriage reflects the state's strong preference that men and women who engage in this kind of inherently child-producing relationship do so in the context of a mutual commitment of lifelong, exclusive fidelity.

Marriage enables a man and a woman to make a legally binding public declaration of lifelong exclusive fidelity, not to appease the couple's desire to have their “love” sanctioned or recognised by the state, but because of the important role that this legal commitment plays in keeping the natural family together, in the best interests of society.

Article 23 of the UN International Covenant on Civil and Political Rights states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” This same Article 23 goes on to affirm the compound right “of men and women of marriageable age *to marry and to found a family.*” (emphasis added)

Importance of the legal bond

Marriage establishes a substantial, publicly witnessed, legally enforceable bond between husband and wife. This is important, because the voluntary union of two people is, on its own, far weaker than the immutable bonds of kinship which bind both mother and father to their children, and which link the couple's children to one another and to their extended family relations and ancestors. Promises can be retracted; biological kinship cannot. The legal dimension of marriage adds an extra layer of reinforcement to the spouses' voluntary commitment of lifelong fidelity. In doing so, marriage helps to preserve the interests of the children.

Marriage is the legal keystone holding the biological family together

Marriage may be *between* two people, but marriage is not just about the marrying couple. Marriage is the legal keystone in the midst of a much larger arrangement of interconnected extended family relationships from which we derive our sense of place in society and in history, and which are essential to our developing a healthy sense of identity.

We know that family and identity are closely related, because we have seen in our own nation's history the traumatic loss of identity experienced by several generations of children who, for various reasons, were separated from their biological families, and for which governments have seen fit to apologise. This sense of loss of identity has also been powerfully expressed by adoptees – including many adoptees who had happy home lives with their adopting parents – and more recently by donor-

conceived individuals, particularly those who do not know the identity of one or both of their biological parents.

We know how important biological family ties are when we see the soaring popularity of television programmes like *Find My Family*, and *Who Do You Think You Are?* and when we see how enthusiastically Australians have embraced ancestry search services like *Ancestry.com*.

From a practical point of view, we know how important it is not to be separated from one's own biological family if we are to know vital information about our family members' medical histories.

We know how important it is not to remove children from their families, because the principle has been enshrined in a binding international treaty – the United Nations Convention on the Rights of the Child – to which Australia is a signatory.

These are just some of the reasons the state has such a strong interest in encouraging heterosexual couples to enter into (and honour) a commitment of lifelong, exclusive fidelity to one another. When they do, the natural result is for their children's rights to be protected and vindicated, and for the vital bonds of biological kinship to be maintained and strengthened. Even in an imperfect world, marriage – between a man and a woman – offers this most basic level of security to the vast majority of children.

By contrast, the state does not have an equivalent interest in encouraging homosexual couples to enter into lifelong, exclusive relationships. Such relationships may offer stability, but they cannot vindicate a child's right to know and be raised by his or her parents.

Essentially, if we were to change the definition of marriage so that it is no longer about the union of a man and a woman, we would be taking away the security of many children in the future to know and be raised by their biological parents. The institution of marriage would no longer be a mechanism for reinforcing the bonds of family kinship which are so important to each of us. Every child has a mother and father. Every child has biological relatives and ancestors. Children have a fundamental right to know them, and to be among them, and it is through marriage that the state protects and vindicates these basic children's rights.

The concerns and needs of same-sex couples must be addressed, but not by redefining marriage

There is no question that men and women in same-sex relationships must be treated justly and fairly, and treated with the respect and dignity that is their due. This does not require the state to fundamentally change the meaning of marriage. Rather, already available legal mechanisms can and should be employed to address any shortcomings in the law as it stands.

It's ok for the state to treat different kinds of relationships differently

The fact that the legal institution of marriage specifically corresponds with the particular significance of the lifelong, exclusive heterosexual union does not mean that other kinds of relationships aren't significant. It just means that no other kind of relationship has the *same* significance, and so the state does not have the same interest in recognising other relationships in the same way.

Lifelong, loyal friendships, for example, are extremely significant and immeasurably beneficial, both to individuals and to society. But they are not significant for the same reasons that lifelong, exclusive heterosexual unions are significant, so they are not recognised by the state in the same way. Indeed, despite their immense value, friendships are not recognised by the state at all.

Similarly, given that same-sex relationships are not conducive to human reproduction in the same way that heterosexual relationships are, they don't attract the *same* kind of recognition from the state. That is to say, same-sex and opposite-sex relationships are different in a deeply significant way, and so, quite sensibly, they are treated differently.

This is no slight on persons in such relationships; just an acknowledgment of the truism that different kinds of relationships are, in fact, different. If our dogmatic impulse to stamp out discrimination leads us to treat significantly different things as if they are not different, the result is not justice; it is legal absurdity.

This can be illustrated by an analogous case, also related to sex and gender: maternity leave.

Maternity leave is an entitlement specifically for women in paid employment who have recently given birth, miscarried, or adopted a child. As such, the entitlement excludes women who have *not* recently had a child. It especially excludes infertile women. And obviously it excludes men.

Is maternity leave discriminatory? Should it be more inclusive?

It could certainly be argued that the maternity leave system is unjust to the extent that certain women are excluded from a substantial workplace entitlement merely on the basis of a medical condition (infertility). This is to say nothing of those “socially infertile” (i.e. single) women who can’t fall pregnant, and can’t afford IVF.

What’s more, it is arguable that there would be broad positive consequences in the community if fertile and infertile women were treated in exactly the same way: such a move might provide a potentially positive impact on the psychological health of infertile women, and improve community perceptions of infertility.

The benefits of making maternity leave more inclusive really do ring true. So why persist with a discriminatory system?

The answer is simply that making maternity leave more inclusive would defeat the entire purpose of the scheme in the first place, which is to provide assistance specifically to women who have just had a child. Maternity leave schemes are *supposed* to “discriminate”, by addressing a specific situation of unique significance (i.e. maternity) in a very specific way.

Similarly, through marriage, our legal system treats a specific relationship (i.e. the heterosexual union) of unique significance (i.e. it is the relationship by which our species reproduces itself) in a very specific way. This is sensible government policy, not discrimination.

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For these reasons we urge the Committee to recommend that the definition of marriage remain unchanged, and that the proposed legislation be rejected.

Respectfully yours,

Tim Cannon

For the Australian Family Association